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Third report on the provisional application of treaties

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I. Introduction

1. In his second report on the provisional application of treaties,[1] submitted in June 2014 for consideration by the International Law Commission, the Special Rapporteur considered the legal effects of provisional application as well as the legal consequences of the breach of a treaty applied provisionally. The report also provided a summary of the views expressed by various Member States regarding the first report and the comments of some States regarding their practice in respect of provisional application.

2. The discussion held by the Sixth Committee of the General Assembly has proven to be very useful in guiding the continuation of this research. Twenty-seven Member States and the European Union spoke on the topic.

3. It was generally agreed that the provisional application of a treaty constitutes a means to contribute to its more timely entry into force and that, given its flexibility, provisional application accelerates the acceptance of international law. With respect to the legal effects of provisional application, there was support for the Commission's view that the rights and obligations of a State which has decided to provisionally apply a treaty are the same as if the treaty were in force. In that regard, it was noted that a breach of the obligations assumed under the provisional application of a treaty is an internationally wrongful act which gives rise to the international responsibility of the State.[2]

4. Several delegations referred to the provisional application of a treaty by means of a unilateral commitment and emphasized that it cannot be characterized as a unilateral act since article 25 of the 1969 Vienna Convention on the Law of Treaties assumes the existence of an agreement between the potential States parties to a treaty and the objective of provisional application is to establish treaty relations. If the treaty does not provide for the possibility of provisional application, it is necessary to establish that it has been agreed in some other manner, as stated in article 25, paragraph 1 (b), of the 1969 Vienna Convention.[3]

5. However, this conclusion does not rule out the possibility that a State could commit itself to respecting the provisions of a treaty by means of a unilateral declaration without obtaining the agreement of the potential States parties. In such cases, the provisional application could only lead to obligations incumbent upon the State declaring the unilateral commitment.[4] That was the situation the Special Rapporteur sought to address in his second report, particularly with regard to cases where the treaty is silent and the will of the States involved in the negotiation of the treaty cannot be determined. Evidently, the issue has been clarified and will not be further addressed for the time being.

6. Another key question addressed by the Sixth Committee in its discussion, and, naturally, by the Commission, has been the future direction of the Special Rapporteur's mandate and the pending work. This issue will be the focus of the conclusion of the present report. However, the Special Rapporteur believes that there is now sufficient evidence for him to submit some draft guidelines for

[1] A/CN.4/675.
[2] A/CN.4/678, paras. 66-76.
[3] Ibid., para. 70.
[4] Ibid.

consideration by the Commission. The draft guidelines presented below are not based exclusively on issues covered in this third report but derive jointly from the three reports submitted by the Special Rapporteur, which should each be read in the light of the others.

7. This third report, which follows the approach proposed by the Special Rapporteur[5] and fully takes into account the very valuable suggestions of Commission members and Member States,[6] addresses four issues in particular.

8. First, it offers an analysis of the comments on State practice that were provided after the second report was submitted, in response to a request from the Commission. Although the number of comments available remains low, an attempt has been made to better systematize State practice, while recognizing that it remains insufficient.

9. In that regard, it should be noted that the question of whether to proceed with a comparative study of constitutional law, and perhaps also of administrative law, with a view to further identifying State practice, was not entirely resolved during the discussions of the Sixth Committee. Some States consider that it is not relevant to this topic, while others believe that such a study is necessary to gain a better understanding thereof.

10. On that point, the Special Rapporteur continues to believe that, for reasons which have been set forth in both the Commission and the General Assembly,[7] the final outcome of the Commission's work on the topic should not be affected by the domestic law of States regarding the provisional application of treaties, since a significant number of treaties discussed in the present report contain a clause that provides for provisional application to the extent that it is permitted by the provisions of the domestic legislation of each State. Moreover, the risk of misinterpreting States' domestic laws naturally discourages the Special Rapporteur from undertaking this endeavour. That being said, the Special Rapporteur remains open to any guidance that the Commission may wish to offer him.

11. Second, the report summarizes the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties. That was a pending task and might require further study based on the issues raised during the Commission's consideration of the present report.

12. Third, the report examines the provisional application of treaties by international organizations, as envisaged in article 5 of the 1969 Vienna Convention on the Law of Treaties, and in the light of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

13. Lastly, as noted above, the report presents draft guidelines that have been developed as a result of the study of the topic to date. The Special Rapporteur does not intend to request the approval of the Commission to refer these draft guidelines to the Drafting Committee during the present session, but rather expects to receive the comments of the Commission and of Member States in the Sixth Committee and to take a decision thereon at the Commission's next session.

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[5] A/CN.4/675, paras. 97-98.

[6] A/CN.4/678, paras. 73-75.

[7] Ibid., para. 74.

14. The Special Rapporteur will address his proposal for continued consideration of the topic in the conclusion of this report.

II. Continuation of the analysis of views expressed by Member States

15. By the time the second report was completed, the Commission had received comments on national practice from 10 States: Botswana, the Czech Republic, Germany, Mexico, Micronesia (Federated States of), Norway, the Russian Federation, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America.[8] A preliminary assessment of those national reports was made in the second report.

16. The Commission has since received comments from Austria, Cuba, Finland (on behalf of the Nordic countries), the Republic of Korea and Spain, as well as additional comments from the Czech Republic. The said reports on State practice, as well as those mentioned in paragraph 15, will be analysed below in a more systematic manner.

17. First, it should be noted that none of the comments submitted by the 15 States as at the time of writing of this report (May 2015) indicate that the provisional application of treaties is prohibited by their domestic law. With the exception of Botswana, all of the States reported that they have resorted to provisional application; Botswana specified that while it has no practice in that regard, its Constitution does not prohibit the provisional application of treaties. It can therefore be said that provisional application is permitted by the domestic law of those States that have submitted comments to the Commission.

18. Regarding the conditions under which States may resort to provisional application, Austria, Botswana, the Czech Republic, Germany, Micronesia (Federated States of), Norway, the Republic of Korea, the Russian Federation, Spain, the United States of America and Switzerland expressly indicate that the practice must be subject to the requirements of their domestic legislation, especially constitutional requirements.

19. Austria, Botswana, the Czech Republic, Germany, Norway, the Republic of Korea and Switzerland state explicitly that the provisional application of a treaty is subject to the same procedure as is followed for State accession to the treaty. In many of the United States precedents, acceptance of provisional application was by "executive agreement", that is, by "international agreement other than treaty".[9]

20. While Cuba and Mexico report that treaties may be provisionally applied, they do not indicate a specific process that must be followed. In addition to the examples provided by Mexico, which were referenced in the second report,[10] Cuba provides as examples of its national practice the Agreement between the Government of the Republic of Cuba and the Government of the Republic of Cape Verde on the

[8] A/CN.4/675, para. 20.

[9] Library of Congress, Report on the Law of the Sea Treaty: Alternative Approaches to Provisional Application, 93rd Congress, 2nd Session, House Committee on Foreign Affairs (4 March 1974) I.L.M. p. 456. This document analyses the practice of the United States of America in respect of 10 international treaties.

[10] A/CN.4/675, para. 47.

abolition of visas, signed on 3 June 1982, and the Technical and Economic Cooperation Agreement between the Government of the Republic of Cuba and the Government of the People's Republic of China, signed on 22 July 2014.

21. The Russian Federation indicates that provisional application is regulated by the Federal Act on Treaties of the Russian Federation, article 23, paragraph 1, of which essentially reproduces article 25 of the 1969 Vienna Convention.

22. Spain notes that provisional application is regulated by Act No. 25/2014, of 27 November, on treaties and other international agreements, which entered into force on 18 December 2014.[11] This Act replaces the legislative instrument that had regulated the issue since 1972. Under the current Act, it is the Council of Ministers, on the basis of a proposal by the Minister for Foreign Affairs and Cooperation, that takes the decision to provisionally apply a treaty.[12] However, those treaties by which powers deriving from the Spanish Constitution are vested in an international organization or international institution may not be provisionally applied.[13] The termination of provisional application may also be decided by the Council of Ministers; however, as indicated in the comments submitted by Spain, that scenario has not occurred in practice. With regard to the practice of Spain in respect of provisional application, the comments indicate that years in which at least two dozen provisional applications are authorized are not exceptional and provide a list of provisional applications authorized by Spain, by year, since 1992. It is worth noting that only in 2014 were as few as 11 treaties provisionally applied, seven of them bilateral and four of them multilateral.

23. Lastly, it is particularly notable that Finland (on behalf of the Nordic countries), Norway, the Republic of Korea, Spain, Switzerland and the United States of America explicitly indicate that the provisional application of a treaty has the same legal effects as if the treaty were in force.

24. The Special Rapporteur reiterates his appreciation for the comments submitted as well as the interest shown by Member States in the topic of the provisional application of treaties.

25. Pending the further collection of information, the following attempt to categorize State practice may be of interest:

(a) States whose domestic laws or constitutions contain specific provisions regulating provisional application include Belarus, the Netherlands and the Russian Federation;

(b) States in which provisional application is a matter of uncodified practice include Albania, Hungary, Romania and the former Yugoslav Republic of Macedonia;

(c) States in which provisional application is prohibited by their constitutions or not accepted by their legal system include Austria, Brazil, Colombia, Costa Rica, Cyprus, Egypt, Italy, Luxembourg, Mexico and Portugal;

(d) States which permit provisional application in exceptional circumstances include Belgium, Colombia, France, Greece and Turkey;

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[11] *Boletín Oficial del Estado* No. 288 of 28 November 2014. Sect. I, p. 96841.

[12] Ibid., article 15, para. 1.

[13] Ibid., article 15, para. 2.

(e) States which generally allow provisional application include Bosnia and Herzegovina, Finland, Slovakia and Spain;

(f) States which allow provisional application subject to certain conditions include Canada, Denmark, Israel, Lithuania, the Netherlands, Norway, Slovenia, Sweden and the United Kingdom of Great Britain and Northern Ireland.[14]

26. This categorization generally coincides with the comments that have been submitted to the Commission thus far. However, some of the cases described by Quast Mertsch do not correspond to the information provided by States in their comments. The two most obvious examples are Austria and Mexico, which noted that their domestic law allows them to resort to provisional application. The list proposed by Quast Mertsch no doubt represents a doctrinal exercise aimed at systematizing the information available at the time.

III. Relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties

27. Before beginning this analysis, the Special Rapporteur wishes to note that he has not identified in the literature any comments addressing this issue that go beyond the relationship between provisional application and the regimes derived from articles 18 and 26 of the 1969 Vienna Convention, respectively.

28. However, the Special Rapporteur believes that an analysis of the relationship between provisional application and other provisions of the 1969 Vienna Convention is relevant in the light of the practice identified thus far. Furthermore, such analysis responds to the requests made in the context of discussions held by the Commission and the Sixth Committee.[15]

29. It follows from the freedom of States to conclude treaties that they may at any time decide that a treaty, or certain of its provisions, applies provisionally.[16] As the Special Rapporteur stated in his first report, the legal regime derived from provisional application will depend not only on the terms in which provisional application is agreed in the treaty or, where applicable, the separate agreement, but also on subsequent interpretation and practice. In other words, the content and scope of the provisional application of a treaty will depend largely on the terms in which such application is envisioned in the treaty to be applied provisionally.[17] Thus, the relationship of provisional application to other provisions of the 1969 Vienna Convention may be determined by the terms of the treaty or the separate instrument that provides for that practice.

30. As mentioned in the introduction to the present report, this is an initial analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention, which could be expanded in the light of comments from the Commission and States.

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[14] Anneliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature*, Martinus Nijhoff Publishers (2012), pp. 62-64.

[15] See A/C.6/69/SR.25, paras. 72-75 (European Union).

[16] Mark E. Villiger, "Commentary on the 1969 Vienna Convention on the Law of Treaties", (Martinus Nijhoff Publishers, Leiden, 2009), p. 354.

[17] A/CN.4/664, paras. 20-21.

31. In that context, the Special Rapporteur will focus on the provisions whose relationship to provisional application is most evident, namely, article 11 (Means of expressing consent to be bound by a treaty); article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force); article 24 (Entry into force); article 26 ("*Pacta sunt servanda*") and article 27 (Internal law and observance of treaties).

A. Article 11. Means of expressing consent to be bound by a treaty

32. A State's consent to be bound to a treaty may, as a general rule, be expressed by traditional means, such as by signature, exchange of instruments, ratification, acceptance, approval or accession. Furthermore, the last part of article 11 provides that States may express their consent to be bound by a treaty "by any other means if so agreed".

33. One of the reasons for the initial reluctance to introduce the provision on the provisional application of treaties into the 1969 Vienna Convention was the possibility that a contradiction would arise from that practice. It was thought that the practice of provisional application opposed treaty provisions regarding the mode of expression of consent to be bound, which meet internal law requirements, with the agreement on provisional application, which does not necessarily meet those requirements. In that regard, some States indicated that the practice of provisional application bypasses States' internal law regimes or alters the constitutional order.[18]

34. A question that arises with regard to provisional application is whether it can be considered to be an exceptional modality used to express consent to be bound by a treaty. That point is illustrated by the Madrid Convention of 3 July 1880, on the protection of foreign nationals in Morocco. The Convention stipulates that "by exceptional consent of the high contracting parties the stipulations of this convention shall take effect on the day on which it is signed at Madrid".[19]

35. The Special Rapporteur believes that neither the Commission's discussions thus far nor the comments of States lead to such a conclusion. It is important to distinguish between the two concepts. The modalities used to express consent to be bound by a treaty are linked to its entry into force, while provisional application is intended for the period preceding the entry into force of a treaty, that is, prior to a State's expression of its consent to be bound by the treaty in question.

36. Consent to be bound is the pivotal act by which a State expresses its willingness to be bound by the terms of the treaty.[20] Prior to the expression of consent, the instrument is only a text that serves as evidence of what the States negotiated; only after consent has been expressed does the instrument become a treaty within the meaning of the Convention.[21] Once a State has expressed its consent to be bound by a treaty, it qualifies as a "contracting State" within the meaning of article 2, paragraph 1 (f), of the 1969 Vienna Convention.[22]

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[18] Denise Mathy, *Article 25*, in Olivier Corten and Pierre Klein, "The Vienna Conventions on the Law of Treaties. A Commentary" OUP (2011), p. 643.

[19] Denise Mathy, op. cit., p. 646.

[20] Mark E. Villiger, op. cit., p. 176.

[21] Idem.

[22] Ibid., p. 177.

37. What is of relevance to our topic is that the 1969 Vienna Convention provides for specific legal effects once a State has expressed consent to be bound by the treaty, while it is silent on the effects of provisional application. For example, in accordance with article 24, paragraph 2, of the Convention, failing an explicit provision, the negotiating States' expression of consent to be bound gives rise to the treaty's entry into force.

38. However, the obligation of a State to apply treaty provisions provisionally is derived from an explicit clause, contained in the treaty[23] or a separate instrument, or agreed by any other means.

39. The above points to the flexibility surrounding all aspects of provisional application, which is very different from any supposed exceptional modality for entry into force.

40. An excellent example of the flexibility that the 1969 Vienna Convention affords States with regard to the modalities for provisional application is the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.[24] Article 7 (Provisional application) of that Agreement establishes that if on 16 November 1994 the Agreement had not entered into force, in accordance with Article 6, "it shall be applied provisionally pending its entry into force by: (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which ... notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing; (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement; (c) States and entities which consent to its provisional application by so notifying the depositary in writing; (d) States which accede to this Agreement".

41. Article 5 (Simplified procedure) of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea provides that States which have ratified or acceded to the United Nations Convention on the Law of the Sea and which have signed the Agreement shall be considered to have expressed their consent to be bound by the Agreement 12 months after the date of its adoption, unless they notify the depositary that they are not availing themselves of the simplified procedure, in which case those States shall be subject to the provisions of article 4 on consent to be bound by the Agreement and, hence, its entry into force. This procedure has been described as a low-profile tool that States can use to express their consent to be bound by the Agreement.[25] The internal political problems concerning ratification of the Agreement in some of the contracting States to the Convention explain why it was agreed that if a State merely signed the Agreement it would be considered to have expressed its consent to be bound by its terms, with the exception described above.[26]

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[23] Anthony Aust, *Modern Treaty Law and Practice*, p. 172.

[24] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, United Nations, E.97.V.10, p. 215-218.

[25] Anthony Aust, op. cit., p. 114.

[26] Idem.

42. However, that does not mean that the simplified procedure is in any way related to the provisional application of the Agreement, which is provided for in article 7. The simplified procedure is directly related to the entry into force of the Agreement, as provided for in article 4, as an expression of the freedom that negotiating States enjoy pursuant to article 24, paragraph 1, of the 1969 Vienna Convention.

43. As will be seen below, the flexibility that characterizes provisional application has given rise to a wide variety of means by which States may express their wish to avail themselves of it, whilst always maintaining the distinction between provisional application and entry into force of a treaty.

44. In that regard, the means of expressing consent to be bound by a treaty, as provided in article 11 of the 1969 Vienna Convention, may also be used to agree to its provisional application.

B. Article 18. Obligation not to defeat the object and purpose of a treaty

45. In his second report, the Special Rapporteur indicated that "provisional application does indeed have legal effects, even beyond the obligation not to defeat the object and purpose of the treaty in question, as set out in article 18 of the Vienna Convention on the Law of Treaties".[27] However, the relationship of provisional application with article 18 of the Convention is analysed in greater detail in the following paragraphs.

46. Article 18 of the Vienna Convention on the Law of Treaties obliges States to refrain from acts which would defeat the object and purpose of a treaty. The terms "object and purpose" refer to the reasons for which States parties or signatories concluded a treaty, and the continuing functions and *raison d'être* of the treaty.[28]

47. The International Court of Justice used the phrase "object and purpose" in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and explained that it concerns at least what is essential to a treaty.[29] The Commission included the concept in its Guide to Practice on Reservations to Treaties, establishing in guideline 3.1.5 thereof that "a reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty".[30]

48. Signatory States and any State that has "expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed" (article 18), are not obliged to apply a treaty that is not in force. However, it would be wrong to claim that these States have no

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[27] A/CN.4/675, para. 14.

[28] Mark E. Villiger, op. cit., p. 248.

[29] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951, pp. 15 and 27.

[30] *Guide to Practice on Reservations to Treaties*. Report of the International Law Commission on the work of its sixty-third session, supplement No. 10. A/66/10/Add.1, p. 351.

obligation whatsoever in respect of the signed treaty.[31] As the International Court of Justice established in the aforementioned Advisory Opinion:

> Signature constitutes a first step to participation in the Convention ... Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.[32]

49. The Court emphasized the temporary nature of the status of signatory States to the treaty. They may take advantage of that status during the time between signature and ratification, although, as indicated in the Advisory Opinion, they must always respect the obligation to refrain from defeating the object and purpose of the treaty, as a "first step to participation" in the treaty.

50. The case of provisional application is very different. It would not be sufficient for States that decide to provisionally apply a treaty to refrain from defeating its object and purpose, as provisional application is subject to the rule *pacta sunt servanda*.[33]

51. In short, the obligations deriving from provisional application must be fulfilled in the good faith that is to be expected of a State that signs an international treaty. The principle that the actions of signatory States must be governed by good faith was considered by the Permanent Court of International Justice long before the existence of the 1969 Vienna Convention, when it examined what acts of a signatory State could constitute a misuse of rights prior to the entry into force of a treaty.[34]

52. As proposed by Quast Mertsch, the premise that provisional application can be equated to the general obligation to refrain from defeating the object and purpose of a treaty prompts an *argumentum ad absurdum*: why is there a need for provisional application at all, if it produces the same legal consequences as the obligation not to defeat a treaty's object and purpose pending its entry into force?[35]

C. Article 24. Entry into force

53. The provisional application of a treaty presumes that the treaty is not in force. Certain conditions must be met before it can enter into force, such as obtaining the necessary parliamentary approval or reaching a certain number of ratifications. The Special Rapporteur has previously mentioned the problems associated with using the expression "provisional entry into force" to refer to provisional application.[36] As has been stated previously,[37] provisional application should be distinguished from

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[31] V. Crnic-Grotic, *Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties*, Asian Yearbook of International Law, vol. 7 (1997), p. 153.

[32] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, op. cit., p. 28.

[33] Denise Mathy, *Article 25*, in Olivier Corten and Pierre Klein, "The Vienna Conventions on the Law of Treaties. A Commentary" OUP (2011), p. 652. See also Mark E. Villiger, op. cit., p. 357.

[34] *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No. 7.

[35] Anneliese Quast Mertsch, op. cit., p. 174.

[36] A/CN.4/664, paras. 7, 15 and 16.

[37] A/CN.4/664, paras. 7-24.

entry into force within the meaning of article 24 of the 1969 Vienna Convention.[38] They are two distinct legal concepts.

54. Furthermore, article 24, paragraph 2, is without prejudice to those provisions of the treaty that regulate matters arising necessarily before its entry into force (authentication, modalities for the establishment of consent and entry into force, reservations, functions of the depositary, etc.), which apply from the time of the adoption of the text of a treaty although it has not yet entered into force.[39] This situation is also distinct from that deriving from provisional application, as article 24, paragraph 2, concerns only the so-called final clauses of a treaty, while provisional application concerns some or all of the substantive provisions of the treaty, that is, the legal regime which the treaty establishes.[40]

55. Lastly, the entry into force of a treaty has to be distinguished from its operation or application.[41] The date of entry into force of a treaty, that is, the date when the negotiated terms become binding, may not be the same as the date of entry into operation of all or some of its stipulations. The latter date may well be posterior to the former.[42] While the entry into force of a treaty and its entry into operation or application may coincide, it is perfectly possible for them to occur separately.[43] It should also be noted that this is distinct from the intention of the regime of provisional application, although an agreement on provisional application may result in such a situation.

D. Article 26. "*Pacta sunt servanda*"

56. The relationship between articles 25 and 26 of the 1969 Vienna Convention will not be analysed in depth here, as the legal effects of treaties that are applied provisionally were discussed in the Special Rapporteur's second report,[44] which states that "the obligations arising from provisional application fall within the scope of the *pacta sunt servanda* principle, in that they constitute a commitment to perform the obligations thus acquired in good faith".[45] This was also expressed as far back as during the debates of the Vienna Conference, 1968 and 1969.[46]

57. The principle that "obligations must be observed" (*pacta sunt servanda*) extends also to provisionally applied treaties. In that respect the legal consequences of the provisional application of a treaty are the same as the legal consequences of its entry into force. The regime of provisional application presupposes that the obligations arising from the provisionally applied treaty will be complied with in full until the treaty enters into force, or until its provisional application is terminated by mutual agreement of the States among which the treaty is being applied

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[38] Mark E. Villiger, op. cit., p. 354.

[39] Idem. Anthony Aust, *Article 24*, in Olivier Corten and Pierre Klein, "The Vienna Conventions on the Law of Treaties. A Commentary" OUP (2011), p. 637.

[40] Anneliese Quast Mertsch, op. cit., p. 12.

[41] Anneliese Quast Mertsch, op. cit., p. 11.

[42] Brierly, J. L., *First Report on the Law of Treaties*, document A/CN.4/23, para. 103.

[43] Anneliese Quast Mertsch, op. cit., p. 12.

[44] A/CN.4/675, paras. 23-68 and 86-95.

[45] Ibid., para. 65.

[46] Anneliese Quast Mertsch, op. cit., p. 49.

provisionally, or until the State notifies the other States provisionally applying the treaty of its intention not to become a party to the treaty.[47]

58. Provided that it is valid, provisional application produces the same legal effects as any other international agreement and is therefore subject to the rule *pacta sunt servanda*.[48] Its legal effects are definite and enforceable and cannot subsequently be called into question in view of the "provisional" nature of the treaty's application.[49]

59. Thus, the principle of *pacta sunt servanda* is applicable to a provisionally applied treaty until its provisional application comes to an end, whether that be as a result of the terms of the treaty, agreement of the parties, notification of the intention not to become a party to the treaty, or entry into force of the treaty.

E. Article 27. Internal law and observance of treaties

60. Article 27 of the 1969 Vienna Convention directly relates to the binding nature of a treaty, which is determined exclusively by international law, meaning that its execution by the parties cannot depend on, or be conditional to, their respective internal laws.[50] In other words, whatever the provisions of the internal law of a State party to a treaty, they will have no effect on the international obligations of the State or the responsibility that may be incurred for any failure to carry them out.[51]

61. While it is true that each State may decide, as a matter of internal law, whether to allow provisional application and if so upon what conditions,[52] a violation of internal law cannot justify a party's failure to perform a treaty. Consequently, the failure to perform an agreement on provisional application owing to a violation of provisions of the internal law of a State will engage its international responsibility.[53]

62. The arbitral tribunal that heard the *Yukos* case had the opportunity to analyse the relationship between the provisional application of the Energy Charter Treaty and article 27 of the 1969 Vienna Convention. In that case, the Russian Federation argued that since the limitation clause contained in article 45 (1) of the Treaty[54] recognized the priority of the constitution, it should be interpreted in such a way as to avoid any impingement on the prerogatives of the national legislative authority (the State Duma, in the case of the Russian Federation) and that, therefore, no provision of the Treaty could be provisionally applied unless (i) it was in line with

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[47] B. I. Osminin, *The Adoption and Implementation by States of International Treaty Obligations* (Moscow, Volters Kluver, 2006); see also Jan Klabbers and Rene Lefeber (ed.), *Essays on the Law of Treaties*, Martinus Nijhoff Publishers (1998), p. 89.

[48] Denise Mathy, op. cit., p. 652.

[49] Mark E. Villiger, op. cit., p. 354.

[50] Annemie Schaus, *Article 27*, in Olivier Corten and Pierre Klein, "The Vienna Conventions on the Law of Treaties. A Commentary" OUP (2011), p. 689.

[51] Article 7, "Obligatory character of treaties: the principle of the supremacy of international law over domestic law". Fourth report by G. G. Fitzmaurice, Special Rapporteur, document A/CN.4/120, in Yearbook of the International Law Commission 1959, vol. II, p. 47.

[52] Anneliese Quast Mertsch, op. cit., p. 64.

[53] Denise Mathy, op. cit., p. 646.

[54] Energy Charter Treaty, article 45 (1): "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."

existing legislation; (ii) it involved an act that fell under the exclusive competence of the executive branch; or (iii) it involved an act approved by the State Duma. In other words, the Russian Federation sought to make the provisional application of the Treaty subject to its internal law.

63. The arbitral tribunal held that, in accordance with the principle of *pacta sunt servanda* and article 27 of the 1969 Vienna Convention, a State may not invoke its internal legislation as a justification for its failure to perform a treaty:

> In the Tribunal's opinion, this ... principle ... strongly militates against an interpretation of Article 45 (1) that would open the door to a signatory, whose domestic regime recognizes the concept of provisional application, to avoid the provisional application of a treaty (to which it has agreed) on the basis that one or more provisions of the treaty is contrary to its internal law. Such an interpretation would undermine the fundamental reason why States agree to apply a treaty provisionally. They do so in order to be able to assume obligations immediately, pending the completion of various internal procedures necessary to have the treaty enter into force.[55]

64. The tribunal went even further, establishing that "allowing a State to modulate (or ... eliminate) the obligation of provisional application, depending on the content of its internal law in relation to the specific provisions found in the Treaty, would undermine the principle that provisional application of a treaty creates binding obligations".[56] It emphasized that articles 26 and 27 of the Vienna Convention on the Law of Treaties did not admit an interpretation that would allow a signatory State whose domestic regime recognizes provisional application to avoid provisionally applying a treaty on the basis of its internal law.[57]

65. Thus, in the *Yukos* case, it was recognized that provisional application is a question of public international law, which should not be combined with domestic law to form a hybrid in which the content of domestic law directly controls the content of an international legal obligation.[58]

66. The Special Rapporteur wishes to stress that in the Interim Award on Jurisdiction and Admissibility in the *Yukos* case, the tribunal recognized that a treaty must not allow domestic law to determine the content of an international legal obligation "unless the language of the treaty is clear and admits no other interpretation",[59] which reaffirms that States have absolute freedom to negotiate the terms of a treaty and, hence, its provisional application.

67. Another relevant aspect of this analysis is the question whether a treaty must be in force in the internal order as a condition for applicability of article 27 of the Vienna Convention on the Law of Treaties. It is generally considered that the obligation to perform the treaty exists from the moment that the treaty has entered into force in the international order.[60]

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[55] *Interim Award on Jurisdiction and Admissibility of 30 November 2009, Yukos Universal Limited (Isle of Man) v. The Russian Federation*, para. 313.

[56] Ibid., para. 314.

[57] *Interim Award on Jurisdiction and Admissibility of 30 November 2009, Yukos Universal Limited (Isle of Man) v. The Russian Federation*, para. 313.

[58] Ibid., para. 315.

[59] Ibid.

[60] Annemie Schaus, *Article 27*, in Olivier Corten and Pierre Klein, "The Vienna Conventions on the Law of Treaties. A Commentary" OUP (2011), p. 697.

68. There is no doubt that, as stated in previous reports and during discussions in the Commission and the Sixth Committee, States resort to provisional application provided that it is permitted or not prohibited by their internal law.[61] It is nonetheless interesting to note that, in the *Yukos* case, the tribunal highlighted that Russian domestic law recognizes the concept of provisional application, but did not state that such recognition is a condition for the validity of provisional application at the international level.

69. Even when it is not prohibited, States sometimes do not make use of the option of provisional application, simply because many States require parliamentary consent in order to provisionally apply a treaty.[62]

70. However, the Special Rapporteur considers that once a treaty is being provisionally applied, internal law may not be invoked as justification for failure to comply with the obligations deriving from provisional application. That would be contrary to the law on State responsibility, according to which the characterization of an act of a State as internationally wrongful is governed by international law and such characterization is not affected by the characterization of the same act as lawful by internal law.[63]

IV. Provisional application with regard to international organizations

A. Background

71. As was decided in the second report,[64] the Special Rapporteur undertook to address in the present report the question of the provisional application of treaties by international organizations, as had been requested by both Member States and the Commission.

72. In 1949, the International Court of Justice determined that an organization is an international person, which means that it is a subject of international law, possessing rights and duties.[65] That legal personality is the key element that allows an international organization to be bound by treaties, although its legal capacity to acquire rights and duties through treaties is not inherent to its status as a subject of international law, as is the case with a State,[66] but is governed by the organization's rules.[67]

73. It is States that confer legal personality and capacity on international organizations when they are constituted. The treaty mechanisms by which States confer powers on an international organization are either by use of the constituent

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[61] A/CN.4/664, para. 44; A/CN.4/675, para. 17.

[62] Anthony Aust, *Modern Treaty Law and Practice*, op. cit., p. 155.

[63] Article 3, annex to resolution 56/83 of 12 December 2001, "*Responsibility of States for internationally wrongful acts*".

[64] A/CN.4/675, para. 98.

[65] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 174 and 179.

[66] 1969 Vienna Convention, art. 6.

[67] 1986 Vienna Convention, art. 6.

treaty or, on a more ad hoc basis, by negotiation of a treaty that is separate from the constituent treaty.[68]

74. It is useful to make the following distinction. On the one hand, the report will examine treaties by which two or more States decided to constitute an international organization, and treaties adopted within an international organization, in accordance with article 5 of the 1969 Vienna Convention. On the other hand, the report will examine treaties concluded between States and international organizations or between international organizations that are governed by the 1986 Vienna Convention and may be the constituent instrument of a new international organization or entity or, as is very common, are intended to regulate matters relating to the headquarters of an international organization previously established under a different treaty.

75. In that context, both the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations are pertinent to the present report. It should be emphasized that "the general rule according to which all treaties between States are subject to the rules of the Convention [of 1969] 'unless the treaty otherwise provides' also applies to constituent instruments of international organizations."[69]

B. Memorandum prepared by the Secretariat on the legislative development of article 25 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

76. While the Special Rapporteur did not consider it necessary to address the legislative development of article 25 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations in his first report, such analysis provides valuable input for consideration of the topic in this third report, as expressed both by members of the Commission and by Member States during discussions in the Sixth Committee.

77. Thus, "at the 3243rd meeting, held on 8 August 2014, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the *travaux préparatoires* of the relevant provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986."[70]

78. It is important to note that the aforementioned Convention is not yet in force, since that would require ratification by 35 states, in accordance with article 85 of the Convention. To date, only 31 States have ratified it, together with 12 international organizations. Nevertheless, its legislative history is relevant to the study of the topic under consideration.

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[68] Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (New York, Oxford University Press, 2005), p. 18.

[69] A/CN.4/683, Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Georg Nolte, Special Rapporteur, 7 April 2015, para. 22.

[70] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10* (A/69/10), Report of the International Law Commission, para. 227.

79. On 25 November 2014, the Secretariat circulated a memorandum[71] supplementing the memorandum submitted in 2013, which outlines the previous work undertaken by the Commission in the context of its work on the law of treaties and on the *travaux préparatoires* of article 25 of the 1969 Vienna Convention on the Law of Treaties.[72]

80. The Special Rapporteur wishes to thank the Secretariat for preparing this very valuable input. It is not necessary to summarize the memorandum in the present report; it is, however, worth highlighting a few elements contained therein.

81. Article 25 of the 1986 Vienna Convention reads as follows:

> "1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty."

82. It is clear from reading article 25 of the 1969 and 1986 Conventions, respectively, that their wording is practically identical. As is stated in the memorandum, when draft articles 24 and 25 were submitted, the Special Rapporteur, Paul Reuter, said that "the two articles were based on the corresponding provisions of the Vienna Convention, from which they differed only to the extent of the drafting changes needed in order to take account of international organizations."[73] He added that the flexibility of articles 24 and 25 of the 1969 Vienna Convention meant that they could be adapted to any situation which might result from agreements concluded by international organizations.[74]

83. The second element mentioned in the memorandum of the Secretariat is that, during the 1986 Vienna Conference, draft article 25 of the Convention was referred directly to the Drafting Committee without substantive consideration in the plenary of the Conference.[75] Article 25 was in the end adopted by the Conference without a vote.[76]

84. It could be that the 1986 Vienna Conference endorsed, without repeating, the deliberations of the 1969 Conference and the decisions adopted with regard to the law of treaties between States. After all, article 25 of the 1969 Convention

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[71] A/CN.4/676.

[72] A/CN.4/658.

[73] A/CN.4/SR.1435, Question of treaties concluded between States and international organizations or between two or more international organizations, para. 4.

[74] Ibid.

[75] A/CN.4/676, para. 37.

[76] Ibid., para. 40.

"... underwent considerable change at the Vienna Conference",[77] and so the participants at the 1986 Conference avoided additional discussions that would have led to the same result as in 1969.

85. These elements, together with the considerations set forth in the first and second reports,[78] provide greater clarity with regard to certain features of the provisional application of treaties that have arisen as a result of practice, namely:

(a) That the wording of article 25 of the 1969 and 1986 Vienna Conventions, "demonstrates the flexibility which States enjoy in view of a forthcoming treaty";[79]

(b) That even though it may be argued that it is not an essential provision for the law of treaties regime, and is therefore not obligatory, it does have an indicative nature and its general nature "will mean that it is enriched by practice";[80]

(c) That article 25, "enunciating one ... a number of aspects of the freedom of States to conclude treaties, indubitably re... ...ts an established customary rule of international law";[81] and

(d) That the legal regime of provisional application of treaties between States and international organizations or between international organizations is, *mutatis mutandis*, the same as that relating to treaties between States, with the legal effects derived from the *pacta sunt servanda* principle.

C. Provisional application of treaties establishing international organizations and international regimes

86. International practice shows that States have repeatedly agreed to the provisional application of treaties establishing international organizations or some type of international regime.

87. Provisional application can play a key role in the complex process of establishing and setting up a new international organization or facilitating the establishment of an international organization.[82]

88. The legal literature contains examples of the provisional application of organizations' constituent instruments dating back to the nineteenth century, for example the administrative union in the nineteenth century, the establishment in 1875 of the International Bureau of Weights and Measures by virtue of the Metre Convention, or the establishment of the International Labour Organization, founded on 28 June 1919, by virtue of the Treaty of Versailles.[83]

89. The Secretary-General of the United Nations, in 1973, prepared a report that provides examples of precedents of States and international organizations

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[77] Mark E. Villiger, op. cit., p. 357.

[78] A/CN.4/664 and A/CN.4/675.

[79] Mark E. Villiger, op. cit., pp. 357-358.

[80] Daniel Vignes, "Une notion ambigüe: l'application à titre provisoire des traités", *Annuaire français de droit international*, vol. 18, 1972, p. 192.

[81] Mark E. Villiger, op. cit., p. 357.

[82] Andrew Michie, "The role of provisionally applied treaties in international organisations", *The comparative and International Law Journal of Southern Africa*, vol. 39 (2006), p. 48.

[83] Ibid. p. 49.

provisionally applying treaties establishing international organizations or international regimes.[84]

90. In that report, the Secretary-General identifies, as precedents, eight cases "in which provisional measures were taken with respect to multilateral treaties that subsequently came into force".[85]

91. The examples to which the report of the Secretary-General refers are the Provisional International Civil Aviation Organization;[86] the Preparatory Committee of the Intergovernmental Maritime Consultative Organization;[87] the Preparatory Commission of the International Refugee Organization;[88] the Interim Commission of the World Health Organization;[89] the Preparatory Commission of the International Atomic Energy Agency;[90] the International Sugar Agreement;[91] the European Fisheries Convention;[92] and the European Central Inland Transport Organization.[93]

92. As noted in the introduction to the report, the above are examples of "cases in which provisional measures were taken with respect to multilateral treaties that subsequently came into force ...; instances in which the arrangements made remained provisional have not therefore been included."[94] As will be seen below, there are also precedents of treaties that continue to be applied provisionally, at least in part.

93. The first four cases identified above concern the arrangements made to cover the period between the date of preparation of the constitutional instrument of four specialized agencies and the entry into force of that instrument. Much the same pattern was followed in the case of the International Atomic Energy Agency. However, in the last three cases different approaches were taken.[95]

94. As was noted in the second report, the provisional application of treaties has legal effects.[96]

95. Referring to articles 24 and 25 of the 1969 Vienna Convention in his report, the Secretary-General notes that "according to these provisions, the provisional application of a treaty only occurs, strictly speaking, when the treaty itself so provides or the negotiating States have in some other manner so agreed. The International Sugar Agreement, 1968, is an example of a multilateral treaty which

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[84] A/AC.138/88, Report of the Secretary-General on examples of precedents of provisional application, pending their entry into force, of multilateral treaties, especially treaties which have established international organizations and/or regimes.

[85] Ibid., para. 3.

[86] Convention on International Civil Aviation (Chicago Convention), 7 December 1944, (1994) 15 U.N.T.S., 295.

[87] Convention on the Intergovernmental Maritime Consultative Organization, 6 March 1948, U.N.T.S., vol. 289, p. 3, and vol. 1520, p. 297.

[88] Agreement on Interim Measures, 15 December 1946, U.N.T.S., vol. 18, p. 3.

[89] Arrangement of 22 July 1946, U.N.T.S., vol. 14, p. 185.

[90] Annex to the Statute of the International Atomic Energy Agency, 26 October 1956, U.N.T.S., vol. 276, p. 68.

[91] International Sugar Agreement, 3 to 24 December 1968, U.N.T.S., vol. 654, p. 3.

[92] Fisheries Convention, 9 March 1964, U.N.T.S., vol. 581, p. 57.

[93] Provisional Agreement, United Kingdom Treaty Series, No. 2 (1945).

[94] A/AC.138/88, para. 3.

[95] Ibid., paras. 4 and 5.

[96] A/CN.4/675, para. 24.

itself expressly provides for provisional entry into force, under specified conditions."[97]

96. In all the other cases cited, "recourse was had to the adoption of a separate instrument ..., usually by simplified means, in order to make provisional organizational arrangements pending the entry into force of the major treaty and the establishment of the permanent body",[98] with the exception of the Preparatory Committee of the Intergovernmental Maritime Consultative Organization, which was established by a Conference resolution; in that case, provisional application usually takes immediate effect.[99]

97. In short, provisional application allowed the establishment of international bodies or international regimes whose objective was to carry out the preparations necessary for the functioning of a permanent international organization or to commence the operation and execution of the responsibilities of the international organization concerned.[100]

98. The fact that, in his analysis, the Secretary-General divided his examples into cases where the practice reflects the provisions of article 25 of the 1969 Vienna Convention, on the one hand, and "particular examples of the application of article 24 [of the Convention] so far as the manner of entry into force",[101] on the other, is further proof of the flexibility with which States and international organizations interpret and apply article 25 of the Convention.

99. The most famous precedent is, undoubtedly, the 1947 General Agreement on Tariffs and Trade, which was provisionally applied for decades by virtue of a "hugely atypical" protocol of provisional application.[102]

100. Another notable example is the Energy Charter Treaty (1994), which established the Energy Charter Conference. Article 45 (4) of that Treaty states:

> "Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in article 38."[103]

101. As has already been mentioned, the Energy Charter Treaty is of particular relevance as it has been the subject of international arbitration.[104]

102. Moreover, the Secretariat has prepared and made available to the Special Rapporteur a document that collates a total of 50 multilateral treaties concluded between 1968 and 2013, and indicates: (i) the article or provision that addresses the question of provisional application; (ii) the text of the provisional application clauses; (iii) whether the treaty is open to international organizations; and (iv) if it

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[97] A/AC.138/88, para. 9.

[98] A/AC.138/88, para. 10.

[99] Library of Congress, Report on the Law of the Sea Treaty: Alternative Approaches to Provisional Application, 93rd Congress, 2nd Session, House Committee on Foreign Affairs, op. cit., p. 456.

[100] A/AC.138/88, para. 12.

[101] Ibid., para. 10.

[102] Anthony Aust, op. cit., p. 154.

[103] See http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

[104] A/CN.4/675, para. 29.

is, which international organizations are parties to the treaty. While this list is not exhaustive, the Special Rapporteur considers it to be a very useful reference tool and has therefore included the document in question as an annex to the present report.

103. All of these examples highlight not only the use, but also what has come to be called the "useful abuse" of provisional application.[105]

D. Provisional application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations

104. Despite the existence of the aforementioned precedents, at the time the 1969 Vienna Convention was adopted, provisional application clauses were still relatively rare. The growing need for them has been caused by a combination of the requirement to bring treaties that are subject to ratification into force early, and the problem of doing just that. The problem is especially difficult for treaties adopted within the United Nations or the specialized agencies, since they require a substantial number of ratifications for entry into force.[106] A relatively short period of provisional application is therefore envisaged, even if this cannot be complied with.[107]

105. It is noted that, in order to accommodate differing interests and circumstances, clauses on provisional application have tended to become increasingly complex and to embrace a range of possibilities, rather than a single straightforward formula.[108]

106. One example is the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. This Agreement was adopted by the United Nations General Assembly on 28 July 1994 in order to modify, by way of interpretation, some of the controversial provisions of the 1982 Convention. The aim was for the Agreement to be applied in full when the 1982 Convention entered into force on 16 November 1994. In accordance with article 7 of the Agreement, which sets out various modalities for States to avail themselves of the provisional application regime, the Agreement was provisionally applied from 16 November 1994 until its entry into force on 28 July 1996. The decision to provisionally apply the Agreement could be put into practice simply by notifying the depositary, in accordance with article 7, paragraph 1 (c).

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[105] René Lefeber, "The provisional application of treaties", *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (Jan Klabbers & René Lefeber, Eds.) Martinus Nijhoff Publishers (1998), p. 81.

[106] Anthony Aust, op. cit., p. 154.

[107] Treaty on Open Skies, Organization for Security and Cooperation in Europe (1992), United Kingdom Treaty Series (2002), vol. 27, which stipulated that the provisional application should be effective for a period of 12 months from the date when the Treaty was opened for signature. However, the Treaty provided that, should it not enter into force before the period of provisional application expired, that period might be extended if all the signatory States so decided. The entire Treaty was applied provisionally from the date when it was opened for signature in 1992 until it entered into force in 2002.

[108] Andrew Michie, "The role of provisionally applied treaties in international organisations", op. cit., pp. 39-56.

107. This modality of simply notifying the depositary, which could be called the simplified option, has become standard practice in this type of treaty. Other examples include article 15 of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency and article 13 of the Convention on Early Notification of a Nuclear Accident, also dated 1986, which were negotiated under the auspices of the International Atomic Energy Agency.

108. The voluntary nature of this type of clause provides an option that can be used even by a State that was not one of those negotiating the treaty in question, owing to the fact that universal accession tends to be envisaged for multilateral treaties. In cases where the provisional application option is exercised by means of notification, the only requirement is that such an option is provided for in the Treaty or in some other manner so agreed.

109. Moreover, the case may arise where a State decides not to make use of the provisional application option established for all potential States parties to the treaty, in which case that State must notify the depositary of its decision not to apply the treaty provisionally. That possibility was envisaged in article 7, paragraph 1 (a) and (b), of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

110. In the Special Rapporteur's view, the case of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization is another current example underscoring that provisional application can be of great use for the establishment and operation of an international organization.

111. On 10 September 1996, the United Nations General Assembly adopted the Comprehensive Nuclear-Test-Ban Treaty.[109] Almost 20 years after its adoption, the Treaty has still not entered into force.

112. However, article II of the Treaty provides for the establishment of the Comprehensive Nuclear-Test-Ban Treaty Organization. To that end, the Secretary-General of the United Nations, in his capacity as depositary of the Treaty, convened a meeting of States signatories at which a resolution establishing a Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization was adopted.[110] The annex to that resolution details, in its 22 paragraphs, the mandated functions of the Preparatory Commission, including that of undertaking all necessary preparations to ensure the operationalization of the Treaty's verification regime at entry into force.[111] Furthermore, the appendix to the resolution comprises a six-page indicative list of verification tasks assigned to the Preparatory Commission.[112] A review of the indicative list clearly shows that these are substantive functions, with legal effects. Indeed, the Preparatory Commission has concluded agreements with States for the establishment of monitoring facilities in their territories, as provided for in the Protocol to the Comprehensive Nuclear-Test-

[109] General Assembly resolution 50/245.

[110] Resolution establishing the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization. CTBT/MSS/RES/1. Adopted on 19 November 1996.

[111] Ibid., p. 4, para. 13.

[112] Ibid., p. 7-12.

Ban Treaty.[113] International Monitoring System monitoring stations and laboratories are currently operating effectively in 89 States.[114]

113. The Protocol to the Comprehensive Nuclear-Test-Ban Treaty[115] has also been provisionally applied. Article 4, paragraph 1, of that Protocol provides that:

> "In accordance with appropriate agreements or arrangements and procedures, a State Party or other State hosting or otherwise taking responsibility for International Monitoring System facilities and the Technical Secretariat shall agree and cooperate in establishing, operating, upgrading, financing, and maintaining monitoring facilities, related certified laboratories and respective means of communication within areas under its jurisdiction or control or elsewhere in conformity with international law."[116]

114. The establishment and provisional operation of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization has clearly demonstrated, for almost two decades, the usefulness of this concept for the implementation of an international nuclear test verification system with full legal effect. Moreover, the ratifications required pursuant to the Comprehensive Nuclear-Test-Ban Treaty, and annex 2 thereof, in order for the Treaty to enter into force, are not expected to be obtained in the near future.

115. In that regard, the provisional agreements cited above, and the provisional operation of the Preparatory Commission, have every appearance of continuing indefinitely, which highlights the value of the provisional application of the Treaty over and above its purely preparatory function.[117]

116. It is worth considering, lastly, a case in which a series of amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) and its Operating Agreement[118] were provisionally applied. Neither of the two instruments provided for provisional application. Nor was such a concept mentioned when amendments to the two instruments were agreed. The negotiating States therefore had to consider, inter alia, the following questions: (i) whether in the absence of any explicit provision in the Convention, the Assembly of Parties had authority to decide that the amendments could be applied provisionally; (ii) whether a consensus decision would be sufficient and what would happen if one of the Parties objected; and (iii) in the absence of consensus, how many votes would be needed and what rights would be recognized as pertaining to a dissenting Party or Parties.

117. In order to guide their thinking, the negotiating States referred to a number of precedents in which the supreme organs of organizations provisionally applied amendments, without explicit power in their constitutions. Such examples include the General Congress of the Universal Postal Union, the Committee of Ministers of

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[113] For example with Australia, 2123 U.N.T.S. 41; Cook Islands, 2123 U.N.T.S. 111; Finland, 2123 U.N.T.S. 27; Jordan, 2123 U.N.T.S. 59; Kenya, 2123 U.N.T.S. 74; and South Africa, 2123 U.N.T.S. 93.

[114] See http://www.ctbto.org/verification-regime/background/overview-of-the-verification-regime/.

[115] Andrew Michie. "The provisional application of arms control treaties". *Journal of Conflict & Security Law* (2005), vol. 10, No. 3, p. 345 and 369.

[116] CTBT/MSS/RES/1. Protocol to the Comprehensive Nuclear-Test-Ban Treaty, Part I, para. 4.

[117] Andrew Michie. "The provisional application of arms control treaties", op. cit., p. 370.

[118] David Sagar. "Provisional Application in an International Organization", *Journal of Space Law*, vol. 27, No. 2, 1999, pp. 99-116.

the Council of Europe, and, in particular, the practice of the International Telecommunication Union.[119]

118. Essentially, what they needed to do was to establish that the requirement of article 25, paragraph 1 (b), of the 1969 and 1986 Vienna Conventions had been fulfilled, by proving that provisional application had been agreed "in some other manner".

119. Yet another example of a factor that may tip the balance in favour of provisional application is that of the amendment adopted in 2011 by the Meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, in considering the gap that might arise in relation to the entry into force of amendments to the Kycto Protocol, recommended that those amendments could be applied provisionally.[120] That recommendation was endorsed by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, which, in its report on its eighth session (2012), decided that "Parties may provisionally apply the amendment pending its entry into force in accordance with Articles 20 and 21 of the Kyoto Protocol, and ... that Parties will provide notification of any such provisional application to the Depositary."[121]

120. In his second report, the Special Rapporteur addressed the issue of the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.[122]

121. It is, however, worth referring again to that case. When the Syrian Arab Republic unilaterally declared that it would provisionally apply the said Convention, the Director General of the Organization for the Prohibition of Chemical Weapons (OPCW) replied neutrally, informing the Syrian Arab Republic that its "request" to provisionally apply the agreement would be forwarded to the States parties. Although the Convention does not provide for provisional application and such a possibility was not discussed during the negotiations, neither the States parties nor OPCW opposed the provisional application of the Convention by the Syrian Arab Republic, as expressed in its unilateral declaration.[123] In this case, the dialogue between States and OPCW, through its Director General, is worth noting, since it shows that "although the Director General of the OPCW is not the depositary of the [Convention], the Organization, as the implementing body of the Chemical Weapons Convention, had a role to play"[124] in determining the legal effects of provisional application. Moreover, "the conduct of international organizations may serve to catalyse State practice."[125]

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[119] Ibid., p. 104-106.

[120] FCCC/KP/AWG/2010/10 "Legal considerations relating to a possible gap between the first and subsequent commitment periods". 20 July 2010, para. 18.

[121] FCCC/KP/CMP/2012/13/Add.1 "Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its eighth session, held in Doha from 26 November to 8 December 2012. 28 February 2013, para. 5.

[122] A/CN.4/675, paras. 66-68.

[123] See Marie G. Jacobsson, "Syria and the Issue of Chemical Weapons" in *International Law and Changing Perceptions of Security* (Jonas Ebbesson et al. Eds.) Brill Nijhoff, 2014, pp. 137-141.

[124] Ibid., p. 138.

[125] A/CN.4/682, op. cit., para. 75.

122. In conclusion, as was stated by the International Law Association in the final report of the Berlin Conference on Arms Control and Disarmament Law (2004), "the provisional application, as a confidence-building mechanism, reinforces the legal standing of the Comprehensive Nuclear-Test-Ban Treaty, encourages further ratifications, and deters any State from conducting nuclear tests in the future."[126]

E. Provisional application of treaties to which international organizations are party

123. Treaties to which international organizations are party, and which are provisionally applied, also merit analysis in the context of this third report. As has already been mentioned, the 1986 Vienna Convention has not entered into force; however, its rules have full legal effect, because they reflect norms of customary international law.[127]

124. In that regard, "the practice of international organizations relating to the international conduct of the organization or international organizations generally may, as such, serve as relevant practice for purposes of formation and identification of customary international law."[128]

125. In view of the above, a number of cases that are relevant for identifying the practice of international organizations are set out below.

126. Examples of provisionally applied treaties that refer to the establishment of the headquarters of international organizations include:

(a) Headquarters agreement for the establishment of the International Atomic Energy Agency, signed between Austria and the Agency, which entered into force on 1 March 1958, but was applied provisionally from 1 January 1958;[129]

(b) Headquarters agreement signed between Spain and the World Tourism Organization, which was applied provisionally from 1 January 1976 and entered into force on 2 June 1977;[130]

(c) Headquarters agreement signed between Germany and the United Nations for the establishment of United Nations premises in Bonn, which "came into force" provisionally on the same day as it was adopted;[131] and

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[126] *International Law Association*, Berlin Conference (2004), Arms Control and Disarmament Law, p. 6, para. 8.

[127] Andrew Michie, op. cit. N.14, p. 43. For more in-depth analysis, see Andrew Michie, The *Provisional Application of Treaties with Special Reference to Arms Control, Disarmament and Non-Proliferation Instruments*, Master of Laws dissertation submitted at the University of South Africa. Supervisor: Professor EC Schlemmer. November 2004. pp. 86-111.

[128] Third report on identification of customary international law, by Sir Michael Wood, Special Rapporteur. 27 March 2015. A/CN.4/682, para. 76.

[129] Agreement between the International Atomic Energy Agency and the Republic of Austria regarding the headquarters of the International Atomic Energy Agency. (339 U.N.T.S. 151) INFCIRC/15. Footnote 1.

[130] Agreement concerning the legal status of the World Tourism Organisation in Spain. 1047 U.N.T.S. 85. Footnote 1.

[131] Agreement concerning the Occupancy and Use of the United Nations Premises in Bonn. 1911 U.N.T.S. 187. Footnote 1.

(d) Headquarters agreement signed between the United Nations and the Kingdom of the Netherlands for the establishment of the International Criminal Tribunal for the Former Yugoslavia, article XXIX, paragraph 4, of which provides for provisional application of the Agreement as from the date of signature.[132]

127. There are also examples of treaties signed between international organizations that have been applied provisionally. For example:

(a) Agreement concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons,[133] which, in article XVI, paragraph 2, provided for a regime of provisional application upon signature;

(b) Agreement between the World Intellectual Property Organization and the Organization of the Islamic Conference, applied provisionally as from the date of its signature on 3 November 1992;[134]

(c) Agreement concerning the relationship between the United Nations and the International Seabed Authority, also applied provisionally as from the date of signature on 14 March 1977;[135] and

(d) Agreement between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the World Meteorological Organization, article XIII, paragraph 2, of which provides for provisional application of the Agreement.[136]

128. There are even examples of agreements concluded by exchanges of letters between States and international organizations that provide not only for provisional application but also for retroactive effect. That was the case with the agreement between Cyprus and the United Nations regarding the peacekeeping operation in that country.[137] Other examples are the agreements concluded between the International Labour Organization and the Federal Democratic Republic of Ethiopia[138] and the Russian Federation,[139] respectively.

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[132] Agreement between the United Nations and the Kingdom of the Netherlands concerning the headquarters of the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. 792 U.N.T.S. 35.

[133] Agreement concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons. EC-MXI/DEC.1. 1 September 2000.

[134] Agreement on the establishment of working relations and cooperation. 1727 U.N.T.S. 258. Footnote 1.

[135] Agreement concerning the relationship between the United Nations and the International Seabed Authority. 1967 U.N.T.S. 255. Footnote 1.

[136] Agreement between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the World Meteorological Organization. CTBT/LEG.AGR/39. 2 February 2011.

[137] Exchange of letters constituting an agreement concerning the status of the United Nations Peace-Keeping Force in Cyprus. New York, 31 March 1964. 492 U.N.T.S. 57. Provisionally on 31 March 1964 and with retroactive effect from 14 March 1964.

[138] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the International Labour Organization concerning the office of the Organization in Addis Ababa. 2157 U.N.T.S. 255. Provisionally on 8 September 1997 and definitively on 4 June 2001, in accordance with article 10.

[139] Agreement between the Government of the Russian Federation and the International Labour Organisation on the office of the Organisation in Moscow. 2058 U.N.T.S. 30. Provisionally on 5 September 1997 by signature and definitively on 24 September 1998 by notification, in accordance with article 15.

129. The flexibility demonstrated by these cases arises from the need to implement certain provisions of the treaty in question in order to be able to operate in practice within a specific legal framework. They also show that both States and international organizations recognize the legal effects of treaties applied provisionally.

130. On that point, in a questionnaire developed by Anneliese Quast Mertsch on the legal effects of provisional application, which was circulated among States and the legal advisers of international organizations in the period 2007-2008, 12 out of 18 States and 5 out of 7 legal advisers surveyed responded that provisionally applied treaties are legally binding.[140]

V. Preliminary proposals for guidelines on provisional application

131. It was in his first report that the Special Rapporteur first put forward the idea of developing "guidelines" that would be useful for States and international organizations when they decided to apply treaties provisionally.[141]

132. In that respect, and further to the analysis presented in his first and second reports, the Special Rapporteur presents the following initial series of draft guidelines on the provisional application of treaties, although he does not necessarily intend for them to be submitted to the Drafting Committee during the current session. The discussion within the Commission and the opinions expressed by Member States in the Sixth Committee of the General Assembly will provide valuable insights for possible consideration of these draft guidelines by the Drafting Committee during the Commission's next session.

Draft guideline 1

States and international organizations may provisionally apply a treaty, or parts thereof, when the treaty itself so provides, or when they have in some other manner so agreed, provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application.

Draft guideline 2

The agreement for the provisional application of a treaty, or parts thereof, may be derived from the terms of the treaty, or may be established by means of a separate agreement, or by other means such as a resolution adopted by an international conference, or by any other arrangement between the States or international organizations.

Draft guideline 3

A treaty may be provisionally applied as from the time of signature, ratification, accession or acceptance, or as from any other time agreed by the States or international organizations, having regard to the terms of the treaty or the terms agreed by the negotiating States or negotiating international organizations.

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[140] Anneliese Quast Mertsch, op. cit., p. 171.

[141] A/CN.4/664, para. 54.

Draft guideline 4

The provisional application of a treaty has legal effects.

Draft guideline 5

The obligations deriving from the provisional application of a treaty, or parts thereof, continue to apply until: (i) the treaty enters into force; or (ii) the provisional application is terminated pursuant to article 25, paragraph 2, of the Vienna Convention on the Law of Treaties or the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, as appropriate.

Draft guideline 6

The breach of an obligation deriving from the provisional application of a treaty, or parts thereof, engages the international responsibility of the State or international organization.

VI. Conclusion

133. The Special Rapporteur believes that, in submitting the present report, he has fulfilled the request for a study of provisional application in relation to the practice of international organizations; he therefore does not consider it necessary to return to that issue in future reports.

134. It has become clear that the interpretation of article 25 of the Vienna Convention on the Law of Treaties and article 25 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations must be virtually identical, particularly with regard to the legal effects of provisional application.

135. Furthermore, the report has provided relevant examples of practice demonstrating that both States and international organizations frequently resort to provisional application.

136. The Special Rapporteur has also presented an initial study of the relationship of article 25 with other provisions of the 1969 Vienna Convention, with a particular focus on articles 11, 18, 24, 26 and 27.

137. Lastly, the Special Rapporteur looks forward to receiving the reactions to and comments on this report that the Commission and Member States may formulate in order to identify the way forward. The Special Rapporteur would like to receive more reports on State practice and thanks States in advance for preparing such reports and submitting them to the Commission.

138. With regard to its future work, the Special Rapporteur proposes that the Commission should: (i) continue to analyse the relationship of provisional application with other provisions of the 1969 Vienna Convention, such as the reservations regime; (ii) address the question of the relationship between provisional application and succession of States with respect to treaties; (iii) examine the practice of multilateral treaty depositaries; and (iv) study the legal effects of the termination of provisional application with respect to treaties granting individual rights.

139. The Special Rapporteur will also continue to formulate draft guidelines supplementing those presented in this report.

Annex

[Original: English]

Provisional application of treaties by international organizations

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations*[a]	*International organizations that have applied provisionally*
International Cocoa Agreement, 1972	Article 66	(1) A signatory Government which gives a notification under paragraph (1) of article 65 may also indicate in its notification, or at any time thereafter, that it will apply this Agreement provisionally either when it enters into force in accordance with article 67 or, if this Agreement is already in force, at a specified date. An indication by a signatory Government that it will apply this Agreement when it enters into force in accordance with article 67 shall, for the purposes of provisional entry into force of this Agreement, be equal in effect to an instrument of ratification, acceptance or approval. Each Government giving such an indication shall at that time state whether it is joining the Organization as an exporting member or an importing member. (2) When this Agreement is in force, either provisionally or definitively, any Government which gives a notification under paragraph (2) of article 65 may also indicate in its notification, or at any time thereafter, that it will apply this Agreement provisionally at a specified date. Each Government giving such an indication shall at that time state whether it is joining the Organization as an exporting member or an importing member. (3) A Government which has indicated under paragraph (1) or (2) that it will apply this Agreement provisionally, either when it enters into force or at a specified date, shall, from that time, be a provisional member of the Organization until either it has deposited its instrument of ratification, acceptance, approval or accession or until the time limit in its notification under article 65 has expired, whichever is the earlier. If, however, the Council is satisfied that the Government concerned has not deposited its instrument owing to difficulties in completing its constitutional procedures, the Council may extend that Government's provisional membership for a further specified period.	Yes (see article 4)	European Economic Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Cocoa Agreement, 1975	Article 68	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument may, at any time, notify the Secretary-General of the United Nations that it will apply this Agreement provisionally either when it enters into force in accordance with Article 69 or, if it is already in force, at a specified date. 2. A Government which has notified under paragraph 1 that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional member. It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see article 4)	European Economic Community
International Cocoa Agreement, 1980	Article 65	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 66 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting member or an importing member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional member. It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see article 4)	European Economic Community
International Cocoa Agreement, 1986	Article 69	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures, it will apply this Agreement provisionally either when it enters into force in accordance with article 70 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting member or an importing member.	Yes (see article 4)	European Economic Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
		2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional member. It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession.		
International Cocoa Agreement, 1993	Article 55	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 56 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting Member or an importing Member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional Member. It shall remain a provisional Member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (article 4)	European Community
International Cocoa Agreement, 2001	Article 57	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this agreement provisionally either when it enters into force in accordance with article 58 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting Member or an importing Member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional Member. It shall remain a provisional Member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see article 4)	–

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Cocoa Agreement, 2010	Article 56	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the Depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 57 or, if it is already in force, at a specified date. Each Government giving such notification shall inform the Secretary-General whether it is an exporting Member or an importing Member at the time of giving such notification or as soon as possible thereafter. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional Member. It shall remain a provisional Member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see article 4 (5-6))	European Union
International Agreement on olive oil and table olives, 1986	Article 54	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally when it enters into force in accordance with article 55, or, if it is already in force, at a specified date. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement when it enters into force, or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.	Yes (see article 5)	–
Protocol of 1993 extending the International Agreement on Olive Oil and Table Olives, 1986	Article 54	Change article "54" to "55". In paragraph 1, sixth line, change article "55" to "56".	Yes (see article 5)	–

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations*[3]	*International organizations that have applied provisionally*
Grains Trade Convention, 1995	Article 26	Any signatory Government and any other Government eligible to sign this Convention, or whose application for accession is approved by the Council, may deposit with the depositary a declaration of provisional application. Any Government depositing such a declaration shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto.	Yes (see article 2 (2))	European Community
Wheat Trade Convention, 1986	Article 26	Any signatory Government and any other Government eligible to sign this Convention, or whose application for accession is approved by the Council, may deposit with the depositary a declaration of provisional application. Any Government depositing such a declaration shall provisionally apply this Convention and be provisionally regarded as a party thereto.	Yes (see article 2 (2))	European Economic Community
Food Aid Convention, 1986	Article XIX	Any signatory Government may deposit with the depositary a declaration of provisional application of this Convention. Any such Government shall provisionally apply this Convention and be provisionally regarded as a party thereto.	Yes (see article II (2))	European Economic Community
Food Aid Convention, 1995	Article XIX	Any signatory Government may deposit with the depositary a declaration of provisional application of this Convention. Any such Government shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto.	Yes (see article II (2))	European Community
	European Community declaration made upon the declaration of provisional application	The Republic of Austria, the Republic of Finland and the Kingdom of Sweden, having become member States of the European Community on 1 January 1995, will no longer be individual members of this Convention but will be covered by Community membership of the Convention. The European Community accordingly also undertakes to exercise the rights and perform the undertakings laid down in this Convention for those three countries as soon as this Convention is applied provisionally.		
Food Aid Convention, 1999	Article XXII	(c) Any signatory Government may deposit with the depositary a declaration of provisional application of this Convention. Any such Government shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto.	Yes (see article II (b))	European Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
Sixth International Tin Agreement	Article 53	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession under the provisions of article 54, but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will, within the limitations of its constitutional and/or legislative procedures, apply this Agreement provisionally either when it enters into force in accordance with article 55 or, if it is already in force, at a specified date. 2. Any Government referred to in paragraph 1 of this article which notifies the depositary that, as a consequence of applying this Agreement within the limitations of its constitutional and/or legislative procedures, it will not be able to make its contributions to the Buffer Stock Account, shall not exercise its voting rights on matters relating to the provisions of chapters X to XV inclusive of this Agreement. Such a Government shall, however, meet all its financial obligations pertaining to the Administrative Account. The provisional membership of a Government which notifies in the manner referred to in this paragraph shall not exceed 12 months from the provisional entry into force of this Agreement, unless the Council decides otherwise.	Yes (see article 56)	European Economic Community
International Coffee Agreement, 1968, as extended, and the Protocol for the continuation in force thereof	Article 62 (2)	The Agreement may enter into force provisionally on 1 October 1968. For this purpose a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement, 1962, containing an undertaking to apply the Agreement provisionally and to seek approval, ratification or acceptance in accordance with its constitutional procedures, as rapidly as possible, that is received by the Secretary-General of the United Nations not later than 30 September 1968, shall be regarded as equal in effect to an instrument of approval, ratification or acceptance. A Government that undertakes to apply the Agreement provisionally will be permitted to deposit an instrument of approval, ratification or acceptance and shall be provisionally regarded as a party thereto until either it deposits its instrument of approval, ratification or acceptance or up to and including 31 December 1968, whichever is the earlier.	No	–

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations*[3]	*International organizations that have applied provisionally*
International Coffee Agreement, 1976	Article 61 (2)	This Agreement may enter into force provisionally on 1 October 1976. For this purpose, a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement 1968 as Extended by Protocol containing an undertaking to apply this Agreement provisionally and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 30 September 1976, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval. A Government which undertakes to apply this Agreement provisionally pending the deposit of an instrument of ratification, acceptance or approval shall be regarded as a provisional Party thereto until it deposits its instrument of ratification, acceptance or approval, or until and including 31 December 1976 whichever is the earlier. The Council may grant an extension of the time within which any Government which is applying this Agreement provisionally may deposit its instrument of ratification, acceptance or approval.	Yes (see article 4 (3))	European Economic Community
International Coffee Agreement, 1983, and first, second, third and fourth extensions with modifications thereto	Article 61 (2)	This Agreement may enter into force provisionally on 1 October 1983. For this purpose, a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement 1976 as Extended containing an undertaking to apply this Agreement provisionally and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 30 September 1983, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval. A Government which undertakes to apply this Agreement provisionally pending the deposit of an instrument of ratification, acceptance or approval shall be regarded as a provisional party thereto until it deposits its instrument of ratification, acceptance or approval, or until and including 31 December 1983 whichever is the earlier. The Council may grant an extension of the time within which any Government which is applying this Agreement provisionally may deposit its instrument of ratification, acceptance or approval.	Yes (see article 4 (3))	European Economic Community (first extension only)

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Coffee Agreement, 1994, as extended until 30 September 2001, with modifications, by resolution No. 384 adopted by the International Coffee Council in London on 21 July 1999	Article 40 (2)	This Agreement may enter into force provisionally on 1 October 1994. For this purpose, a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement 1983, as extended, containing an undertaking to apply this Agreement provisionally, in accordance with its laws and regulations, and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 26 September 1994, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval. A Government which undertakes to apply this Agreement provisionally, in accordance with its laws and regulations, pending the deposit of an instrument of ratification, acceptance or approval shall be regarded as a provisional Party thereto until it deposits its instrument of ratification, acceptance or approval, or until and including 31 December 1994, whichever is the earlier. The Council may grant an extension of the time within which any Government which is applying this Agreement provisionally may deposit its instrument of ratification, acceptance or approval.	Yes (see article 4 (3))	–
International Coffee Agreement 2001	Article 45 (2)	This Agreement may enter into force provisionally on 1 October 2001. For this purpose, a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement 1994 as extended, containing an undertaking to apply this new Agreement provisionally, in accordance with its laws and regulations, and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 25 September 2001, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 25 September 2001, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 25 September 2001, shall be regarded as equal in effect to an instrument of ratification.	Yes (see article 4 (3))	–

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Sugar Agreement, 1968	Article 62	(1) Any Government which gives a notification pursuant to Article 51 may also indicate in its notification, or at any time thereafter, that it will apply the Agreement provisionally. (2) During any period the Agreement is in force, either provisionally or definitively, and before the deposit of its instrument of ratification, acceptance, approval or accession or the withdrawal of its indication, a Government indicating that it will apply the Agreement provisionally shall be a provisional Member of the Agreement until the time limit contained in the notification given under Article 61 expires. If, however, the Council is satisfied that the Government concerned has not deposited its instrument owing to difficulties in completing its constitutional procedures, the Council may extend that Government's provisional Member status until some later specified date. (3) A provisional Member of the Agreement shall, pending ratification, acceptance or approval of, or accession to the Agreement, be regarded as being a Contracting Party thereto.	Yes (see article 2 (26))	–
International Sugar Agreement, 1973, and first and second extensions thereof	Article 35	1. Any Government which gives a notification pursuant to article 34 may also indicate in its notification, or at any time thereafter, that it will apply the Agreement provisionally. 2. During any period the Agreement is in force, either provisionally or definitively, a Government indicating that it will apply the Agreement provisionally shall be a provisional Member of the Organization until it deposits its instrument of ratification, acceptance, approval or accession, and thus becomes a Contracting Party to the Agreement, or the time limit for the deposit of its instrument in accordance with article 34 has elapsed, whichever is earlier.	Yes (see article 2 (11))	–
International Sugar Agreement, 1977, as extended	Article 74	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the Secretary-General of the United Nations that it will apply this Agreement provisionally either when it enters into force in accordance with article 75 or, if it is already in force, at a specified date.	Yes (see article 2 (23))	–

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
		2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.		
International Sugar Agreement, 1984	Article 37	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 38 or, if it is already in force, at a specified date. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.	Yes (see article 5)	–
International Sugar Agreement, 1987	Article 38	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 39 or, if it is already in force, at a specified date. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.	Yes (see article 5)	–
International Sugar Agreement, 1992	Article 39	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 40 or, if it is already in force, at a specified date.	Yes (see article 5)	–

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
		2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.		
International Natural Rubber Agreement, 1979	Article 60	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will fully apply this Agreement provisionally, either when it enters into force in accordance with article 61, or if it is already in force, at a specified date. 2. Notwithstanding the provisions of paragraph 1 of this article, a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures. However, such Government shall meet all its financial obligations pertaining to the Administrative Account. The provisional membership of a Government which notifies in this manner shall not exceed 12 months from the provisional entry into force of this Agreement. In case of the need for a call-up of funds for the Buffer Stock Account within the 12-month period, the Council shall decide on the status of a Government holding provisional membership under this paragraph.	Yes (see article 5)	European Economic Community
International Natural Rubber Agreement, 1987	Article 59	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will fully apply this Agreement provisionally, either when it enters into force in accordance with article 60 or, if it is already in force, at a specified date. 2. Notwithstanding the provisions of paragraph 1 of this article, a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures. However, such Government shall meet all its financial obligations pertaining to the Administrative Account. The provisional membership of a Government which notifies in this manner shall not exceed 12 months from the provisional entry into force of this	Yes (see article 5)	European Economic Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
		Agreement. In case of the need for a call-up of funds for the Buffer Stock Account within the 12-month period, the Council shall decide on the status of a Government holding provisional membership under this paragraph.		
International Natural Rubber Agreement, 1994	Article 60	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will fully apply this Agreement provisionally, either when it enters into force in accordance with article 61 or, if it is already in force, at a specified date. 2. Notwithstanding the provisions of paragraph 1 of this article, a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures and its domestic laws and regulations. However, such Government shall meet all its financial obligations to this Agreement. The provisional membership of a Government which notifies in this manner shall not exceed 12 months from the provisional entry into force of this Agreement, unless the Council decides otherwise pursuant to paragraph 2 of article 59.	Yes (see article 5)	European Community
International Tropical Timber Agreement, 1983	Article 36	A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 37, or, if it is already in force, at a specified date.	Yes (see article 5)	European Economic Community
International Tropical Timber Agreement, 1994	Article 40	A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 41, or, if it is already in force, at a specified date.	Yes (see article 5)	European Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Tropical Timber Agreement, 2006	Article 38	A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument may, at any time, notify the depositary that it will apply this Agreement provisionally in accordance with its laws and regulations, either when it enters into force in accordance with article 39 or, if it is already in force, at a specified date.	Yes (see article 5)	European Community
International Agreement on jute and jute products, 1982	Article 39	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 40 or, if it is already in force, at a specified date. At the time of its notification of provisional application, each Government shall declare itself to be an exporting member or an importing member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when this Agreement enters into force or, if this Agreement is already in force, at a specified date shall, from that time, be a provisional member of the Organization, until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a member.	Yes (see article 5)	European Economic Community
International Agreement on jute and jute products, 1989	Article 39	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 40 or, if it is already in force, at a specified date. At the time of its notification of provisional application, each Government shall declare itself to be an exporting member or an importing member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when this Agreement enters into force or, if this Agreement is already in force, at a specified date shall, from that time, be a provisional member of the Organization, until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a member.	Yes (see article 5)	European Economic Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982	Article 7	If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by: (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing; (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement; (c) States and entities which consent to its provisional application by so notifying the depositary in writing; (d) States which accede to this Agreement.	No mention, but see article 8 (2)	European Economic Community
Convention on Cluster Munitions	Article 18	Any State may, at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State.	No	–
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction	Article 18	Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.	No	–

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
Terms of Reference of the International Copper Study Group	Paragraph 22 (c)	Any State or any intergovernmental organization referred to in paragraph 5 which desires to become a member of the Group shall notify the depositary that it accepts these terms of reference either provisionally, pending the conclusion of its internal Procedures, or definitively. Any State or intergovernmental organization which has notified its provisional acceptance of these terms of reference shall endeavour to complete its procedures within 36 months of the date of entry into force of these terms of reference or the date of its notification of provisional acceptance, whichever is the later, and shall notify the depositary accordingly. Where a State or intergovernmental organization is not able to complete its procedures within the time limit referred to above, the Group may grant an extension of time to the State or intergovernmental organization concerned.	Yes (see paragraph 5)	–
Agreement establishing the Union of Banana Exporting Countries	Article 38	Any Government of a member country may, if its internal law so allows, inform the depositary Ministry of Foreign Affairs of its provisional acceptance of this Agreement while it completes the required formalities for its final ratification. A country which has recourse to this procedure shall have all the rights and duties which final ratification would give it.	No	–
Arms Trade Treaty	Article 23	Any State may at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.	No	–
Arrangement regarding international trade in textiles (schedule LXXV of the General Agreement on Tariffs and Trade)	–	There is no express mention of provisional application in the Arrangement. However, it is stated in Article 13 (1) that the Arrangement "shall be open for acceptance, by signature or otherwise, by governments contracting parties to the General Agreement on Tariffs and Trade or having provisionally acceded to the General Agreement on Tariffs and Trade and by the European Economic Community". The European Economic Community is also listed under States or organizations provisionally accepting the Arrangement.	Yes (see article 13 (1))	–